Supreme Court, U. S.
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No. 403

IN THE

SUPREME COURT

OF THE

United States

October Term, 1950

DR. DONALD RAFFINGTON,
Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF, AND MOTION TO DISPENSE WITH THE PRINTING OF THE RECORD AND TO PROCEED ON THE TYPEWRITTEN RECORD.

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To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Dr. Donald Raffington, respectfully petitions this Honorable Court for a Writ of Certiorari, directed to the District Court of Appeals, Second Appellate District of the State of California to bring up the record and reverse the judgments below.

OPINION BELOW

The opinion of the District Court of Appeal, Second Appellate District, of the State of California is found at page 427 of the record and is published in 98 A. C. A. No. 6, page 657, 220 Pac. (2d) 967.

JURISDICTION

The Judgment of the District Court of Appeal was entered July 14, 1950. A petition for hearing was thereafter filed in the Supreme Court of the State of California and denied August 10, 1950 (R. 458), Justices Carter and Schauer voting for a hearing. Petition for certiorari is being filed within 90-days of the denial for hearing by the Supreme Court of California, the highest court to which application could be made in the matter, and within the time fixed by Rule 38-1/2 Rules of the Supreme Court of the United States, and by U. S. Code 1254, 1257 (3), and 2104, Title 28, U. S. Codes.

CONSTITUTIONAL AND STATUTORY PROVISIONS

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

SECTION 274 OF THE PENAL CODE OF THE STATE OF CALIFORNIA:

> "§274. [Providing or Administering drug or employing means to procure miscarriage: Punishment.] Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years."

SECTION 686 OF THE PENAL CODE OF THE STATE OF CALIFORNIA:

> "§686. [Rights of defendant; Speedy and public trial; Counsel: Production and confrontal of witnesses: Exceptions.] In a criminal action the defendant is entitled: . . .

3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state; and except also that in the case of offenses hereafter committed the testimony on behalf of the people or the defendant of a witness deceased, insane, out of jurisdiction, or who cannot with due diligence, be found within the state, given on a former trial of the action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted."

QUESTIONS PRESENTED

1. Whether an accused doctor has been denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States where he has been entrapped by agents of the State through fraud and trickery on the part of such agents, who falsely pretend that the woman special agent is pregnant and wants an abortion performed on her, and whether such entrapment constitutes such violation of sound public policy as vitiate a conviction based on such evidence as contravening the Fourteenth Amendment to the Constitution of the United States.

2. Whether, in a criminal trial, the defendant is entitled to be confronted in person by the witness against him, and whether a denial of the right is a denial of due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution.

3. Whether Section 686 of the Penal Code of the State of California, inherently and as construed and applied in this case, violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

4. Whether the defendant has been denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States where there is introduced against him on the actual trial a transcript of the testimony of a witness taken at a preliminary hearing but he is not permitted to be con-

fronted by the witness at the trial, or to cross-examine the witness during the actual trial of the case.

5. Whether due process of law requires that an accused be proceeded against by indictment and not by information, and whether a denial of that right constitutes a violation of the Fourteenth Amendment to the Consitution of the United States.

STATEMENT OF FACTS

The petitioner, Donald Raffington, is a doctor. He was accused by an information filed in the Superior Court of the State of California in and for the County of Los Angeles of attempted abortion, in Count One, and abortion, in Count Two, the attempted abortion having occurred on the 15th day of April, 1949 on one Beverly Appleman and the abortion having allegedly occurred on the 10th day of November, 1948 on Betty Fisher. (R. 1, 2).

Beverly Appleman is an employee and special agent of the State Medical Board of the State of California (R. L70). On April 13, 1949, she went to the office of the doctor on instructions from her superior, (R. 170), and was told to act as if she was really pregnant and wanted to have an abortion (R. 171). She had a conversation with Dr. Raffington after she came into the office with one Mr. H. F. Lamour, also a special agent for the State Medical Board, (R. 174) whom she pretended and represented was her husband. (R. 171)

After she and Mr. Woodruff got to the office of Dr. Raffington she said:

> "Dr. Raffington, this is my husband Harry Appleman", referring to Mr. Lamour, and she said "I am Beverly."
>
> "He said, 'What can I do for you' and I said 'I am going to have a baby and we don't want it.' So he says, 'Well, how come you come to me.' And I says 'a girl friend of mine, Wanda Sears,' *I made up the name.* I says, 'she told me to come up here, that she had had one done here.' And he says, 'I don't recall a Wanda Sears.' And I says, 'well she was up here anyhow.' And he says 'where does she live' and I said 'she lives in Lynwood.' And he says, 'Well, I still don't recall her.' Then he says 'well, when was your last menstruation period' and I says 'the 5th of March.'" (R. 171, 172).

Further discussions followed in which Beverly Appleman and Mr. Lamour further fabricated their claim of the special woman agent's pregnancy. An alleged agreement was made to pay the doctor $150.00 (R. 172). They returned again on the 15th of April, with two other Special Agents of the Medical Board who stayed outside while they went in. (R. 173). On that date they came and said:

> "'We were in here Wednesday.' And I said 'you are supposed to do an abortion on me today.'" (R. 174).

There was some further discussions as to what Dr. Raffington was supposed to have said to them at that

time. (R. 75) and what he was going to use, and the investigator said:

"The jelly you said."

And, Mr. Lamour said, "Well, Doctor, I guess you might as well take this now" and handed Dr. Raffington the money, and he said:

"Well, don't mind if I do."

So he took the money. (R. 177).

At that point Beverly Appleman got on the table and the doctor told her to scoot down on the table while he put on a reflector on his head and covered her with a sheet. At that point he was placed under arrest. He was told by Mr. Lamour that he was under arrest. (R. 177).

The appellant was convicted of abortion upon Betty Fisher, alleged to have been committed on November 10, 1948. The person on whom the alleged abortion was performed was not in the state at the time of trial. She was in Minnesota. (R. 213). According to the testimony of Louise Comer, Betty Fisher told Louise Comer that she did not know whether she was coming back to Los Angeles and she said she might be back after Christmas but didn't know. (R. 214).

Testimony given at a preliminary hearing on September 6, 1949, was introduced into the trial of the case before the jury over the objections of the defendant, (R. 215) that it was a violation of the defendant's

rights under the constitution of the United States, that confrontation was a constitutional right and that reading a preliminary transcript does not afford the accused fair opportunity of confrontation. In this preliminary transcript which came before the jury she testified that she was a secretary working for an insurance company, (R. 218); that she went to the doctor's office on the 10th of November, 1948 with George Sheehan; as to what happened after she got there she said:

"It is a little vague"

She said the doctor asked: "Why we didn't get married." She didn't remember the exact conversation. She said he made an examination of her female organs by inserting an instrument into her uterus and she later stated that he inserted something into her female organs, (R. 226) which took about 20 minutes and then she came back to the office the next day, and he instructed her to return the next day with the contents of any discharge. She assumed that she was pregnant. (R. 232). He did not even know if she was pregnant. (R. 234). He did not know whether she ever passed or discharged any fetus. (R. 234).

Conviction followed on this count and the appellant was sentenced to San Quentin for the term prescribed by law. (Cl. Tr., R. 41).

Betty Fisher had been referred to the appellant by another doctor. (R. 352). Another doctor had sent

her to him. The doctor denied the charges. (R. 249, et seq.)

Federal questions were first raised in the trial of the case, (R. 215, et seq.) as to the use of the preliminary transcript. These issues were again raised in the District Court of Appeal and that court denied the challenge under the Fourteenth Amendment to the Constitution of the United States. (See opinion of the District Court of Appeal, R. 427, et seq).

A petition for hearing was filed in the Supreme Court, (R. 439) which distinctly raised each of the federal questions herein presented. That court denied the challenge under the Fourteenth Amendment to the Constitution of the United States on each of the grounds now being raised on this petition for certiorari.

IMPORTANCE OF THE QUESTIONS RAISED

Each of the questions raised is highly important in the administration of criminal justice in the State of California, to-wit:

I.

Can an accused be entrapped through fraud and trickery and deceit by actual officers and agents of the state without violating due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Must the courts preserve their own purity by excluding testimony secured in such manner and means.

II.

Does the use of a Preliminary Transcript at a preliminary hearing act as a lawful substitute for confrontation of an accused by the witnesses against him in the trial court and in the presence of the court and jury, or does such practice offend procedural due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

III.

Is Section 686 of the Penal Code of the State of California, inherently and as construed and applied in this case, in violation of the Fourteenth Amendment to the Constitution of the United States in permitting the substituion of a Preliminary Transcript for the presence of the accused.

IV.

Has the defendant been denied a fair trial guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V.

Was the accused entitled to be preceded by indictment rather than by information?

Each of these questions is important in the administration of criminal justice in the United States of America.

CASES BELIEVED TO SUSTAIN JURISDICTION:

Lisenba v. California, 314 U. S. 219;

Sorrells v. United States, 287 U. S. 435, 77 L. Ed. 415;

Olmstead v. United States, 277 U. S. 438;

People v. Wallin, 215 Pac. 2d. 1, 34 A. C. No. 38, page 858;

Adamson v. People of the State of California, 332 U. S. 46, 91 L. Ed. 1903.

WHEREFORE, petitioner prays that this Honorable Court grant certiorari to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, the highest court in which a decision was had after denial of the hearing by the Supreme Court of the State of California, two Supreme Court justices having voted for the same.

MORRIS LAVINE,
Attorney for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1950

No.———

DR. DONALD RAFFINGTON, Appellant,
vs.
PEOPLE OF THE STATE OF CALIFORNIA, Appellee.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF FACTS

We reincorporate by reference the Statement of the Opinion Below, the Jurisdictional Statement, Statutes Involved and Statement of Facts presented in a Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

1. The District Court of Appeal, Second Appellate District, State of California erred in holding that there was not such entrapment as to violate due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

devices, a confession is procured and used in the trial." (314 U. S. 237, 86 L. Ed. 180).

In *Sorrells v. United States,* 287 U. S. 435, 77 L. Ed. 415, the court said:

> "The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law." (287 U. S. 435).

In *Olmstead v. United States,* 277 U. S. 438 at 484, Judge Brandeis said:

> "Our government is the potent, the omnipresent, teacher. For good or for evil, it teaches the whole people by its example."

The use of agents for the state to pretend and fabricate a case which, but for their false pretense and misrepresentation would never have existed and thus imprison a doctor and ruin his life career offends every concept of fair play and due process. This constitutes the lawless practice of the law and no conviction based upon it should be permitted to stand.

INSERT

IN THE SUPREME COURT OF THE UNITED STATES—DR. DONALD RAFFINGTON, APPELLANT, vs. PEOPLE OF THE STATE OF CALIFORNIA, APPELLEE.

This Court has many times stated that "officers of the law cannot take advantage of their own wrongdoing. Where the conviction results from the product of the illegal seizure, it must be set aside."

McNabb v. United States, 318 U. S. 332, 87 L. Ed. 819;

Upshaw v. United States, 335 U. S. 410, 93 L. Ed. 100;

Townsend v. Burke, 334 U. S. 736, 92 L. Ed. 1690;

In each of these cases, this Court has excluded expressions secured during illegal detention. *Mooney v. Holohan,* 294 U. S. 103, 113, wherein the court held that a conviction secured by perjured testimony cannot stand because it shocks our fundamental principles of justice and liberty. Seizure of the individual by fraud and trickery, as evidenced by this case, certainly violates every rule of fundamental fairness guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Hebert v. Louisiana, 272 U. S. 312; 317;
Mooney v. Holohan, 394 U. S. 103;

Lisenba v. California, 314 U. S. 219, 86 L. Ed. 166;

Boyd v. United States, 116 U. S. 616.

Seizure of the individual, equally with seizure of property, by means of trickery and fraud is not due process and violates the Fourth and Fifth Amendments to the Constitution of the United States.

Brown v. Walker, 161 U. S. 596;
Boyd v. United States, 116 U. S. 616;
Harris v. United States, 91 L. Ed. 1035;
Mooney v. Holohan, 294 U. S. 103, 113;
Chambers v. Florida, 309 U. S. 227.

A prosecutor's unfairness in the courtroom of an accused in his argument (*Berger v. United States,* 295 U. S. 78) is not half as unfair as officers manufacturing, a case, as in the instant case, and thereafter using the evidence in the courtroom to bring about the conviction. It is comparable to the long line of confession cases which this court has held violate that fundamental fairness constant with due process of law.

Chambers v. Florida, 309 U. S. 227;
Lisenba v. California, 314 U. S. 219;
Ashcraft v. Tennessee, 322 U. S. 143;
Malinsky v. New York, 324 U. S. 401.

Evidence obtained as the result of and during detention violates that fundamental principle that is the very concept of due process of law.

McNabb v. United States, 318 U. S. 332;
Upshaw v. United States, 335 U. S. 410;
Di Re v. United States, 92 L. Ed. 210, 218.

II.

THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, ERRED IN HOLDING THAT THE USE OF A PRELIMINARY TRANSCRIPT MAY BE SUBSTITUTED FOR CONFRONTATION OF A WITNESS AND THAT THE DENIAL OF CONFRONTATION OF A WITNESS TO AN ACCUSED DID NOT DENY HIM DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The right of confrontation of the witnesses against an accused in his trial in court has been held to be a right guaranteed by the constitution of the United States as well as by the Constitution of the State of California.

> *People v. Wallin,* 215 (2d) Pac. 1, 34 A. C. No. 38, Page 858.

The Sixth Amendment to the Constitution of the United States guarantees it and it is generally recognized as an essential part of state constitutional rights guaranteed under the Fourteenth Amendment to the Constitution of the United States. Nevertheless, the State did not confront the defendant with the witness Betty Fisher, (R. 218) because she could not be found in the state. Although her whereabouts were known and she could have been produced. This was over the ob-

jections of defendant that his rights would be violated. (R. 216).

The Preliminary Transcript is not an adequate substitution for confrontation. The right of confrontation is the right to have the jury see and hear the witness testify and determine from that observation whether the juror believes the witness is telling the truth. The preliminary transcript is merely a means of getting testimony before the accused so that he may know the nature of the charges against him in view of the fact that there has been no grand jury hearing of the case. It is his first information about the case. This cannot adequately substitute what an investigation might produce thereafter on which he can base an adequate and full cross-examination in the presence of the jury.

We respectfully submit that the failure to produce the witness at the time of trial constitutes a denial of the right of confrontation guaranteed by the Fourteenth Amendment to the Constitution of the United States, and that this is a highly important question in the administration of criminal law in the state and in various states, which this court should pass upon.

III.

THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, ERRED IN HOLDING, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, THAT SECTION 686 OF THE PENAL CODE OF THE STATE OF CALIFORNIA DID NOT VIOLATE DUE PROCESS OF LAW GUARANTEED By THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

We have set out in point two, the principal argument which applies also to the invalidity of Section 686 of the Penal Code insofar as it purports to authorize the substitution of a preliminary transcript in lieu of the testimony of the witness in the constitutional right of confrontation of the witness.

We submit that a state may not lawfully by statute substitute such a procedure for a constitutional right of an accused to be confronted by witnesses against him. That the statute therefore, inherently and as construed and applied in this case, violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

IV.

THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, ERRED IN HOLDING THAT THE APPELLANT WAS NOT DENIED A FAIR TRIAL GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

We submit that fair trial was not had in this case where the accused, after having been entrapped by agents of the state, through connivance and trickery, was thereafter placed on trial on both that offense and the count in the information with the witness absent. It was very evident that the State used the entrapment in order to fortify the failure to confront the defendant with the witness against him. That such procedure and proceedings violate due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V.

THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, ERRED IN HOLDING THAT AN INFORMATION MAY BE SUBSTITUTED FOR A GRAND JURY INDICTMENT AS THE JUST PROCEDURE DOES NOT VIOLATE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This question has been heretofore presented to this court in *Adamson v. People of the State of California.* We reassert that the Fourteenth Amendment gives the accused this fundamental right.

Adamson v. People of the State of California, (citation) 332 U. S. 46, 91 L. Ed. 1903.

WHEREFORE, your petitioner prays that this Honorable Court grant certiorari and reverse the judgments below.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner,

[TITLE OF COURT AND CAUSE.]

MOTION TO DISPENSE WITH THE PRINTING OF THE RECORD AND TO PROCEED ON THE TYPEWRITTEN RECORD.

COMES NOW the petitioner, Dr. Donald Raffington, and moves this Honorable Court to dispense with the printing of the Record on Appeal and to proceed on the typewritten record for the reason that because of the prosecution and conviction and partial confinement in jail, he has lost considerable practice and is financially embarrassed at the present time.

MORRIS LAVINE,
Attorney for the Petitioner.

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IN THE

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October Term, 1950
No. .....

DR. DONALD RAFFINGTON,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

RESPONDENT'S OPPOSING BRIEF.

Statement of the Case.

Appellant was charged by the District Attorney of Los Angeles County in two informations with the crimes of attempted abortion and two charges of abortion. The one information charged that appellant, on or about the 15th day of April, 1949, in the County of Los Angeles, committed the crime of attempted abortion, a felony, upon the person of one Beverly Appleman. [Clk. Tr. p. 1.] This information also contained a second count charging that appellant, on or about the 10th day of November, 1948, in the County of Los Angeles, committed the crime of abortion, a felony, upon the person of one Betty Fisher. [Clk. Tr. p. 2.]

By another information (hereinafter referred to for convenience as the third count), appellant was charged with the crime of abortion, a felony, committed on or about the 6th day of July, 1949, in the County of Los Angeles upon the person of one Janice Werner. [Clk. Tr. p. 8.] Appellant pleaded not guilty to each of the three charges. [Clk. Tr. pp. 5, 10.] The cases were consolidated for trial. A trial was had before a court and a jury. [Clk. Tr. p. 11.] The jury found the defendant guilty of all three charges. [Clk. Tr. pp. 15-16.] Judgment and sentence were pronounced and appellant was sentenced to be punished by imprisonment in the state prison for the term prescribed by law, the sentence as to each charge to run concurrently. [Clk. Tr. pp. 41-42.] Appellant filed an appeal from the judgment of conviction [Clk. Tr. p. 46], and based his appeal upon the following grounds: (1) That his constitutional rights were violated (App. Op. Br. p. 109); (2) That the trial court, at the time of trial, erroneously admitted the testimony of witnesses given at the preliminary (App. Op. Br. p. 111); (3) That the judgments of conviction are contrary to the law and evidence and the evidence is insufficient to sustain the verdict of guilty. (App. Op. Br. pp. 116-123.) The District Court of Appeal affirmed the judgment of conviction by decision reported in 98 A. C. A. 657. The Supreme Court of California denied a hearing on August 10, 1950.

Statement of Facts.

Count One.

On April 13, 1949, one H. F. Lamour, a special agent for the Board of Medical Examiners of the State of California [Rep. Tr. p. 88], together with another employee, Betty Appleman, visited the offices of appellant in Huntington Park. [Rep. Tr. pp. 89, 117.] Mrs. Appleman told appellant that they were husband and wife and she was pregnant, but she did not want to have the child and that a girl friend of hers by the name of Wanda Sears had told her about appellant. Appellant questioned her about Wanda Sears and stated it was funny but he didn't know her. He asked her when her last menstruation period was and she told him March 5th. Appellant referred to a small calendar and said, "Hell, that is only 23 days. I can't tell whether you are pregnant or not, in fact you might have a tubal pregnancy. You will have to come back in 12 days if I am to do any good for you." Lamour then questioned Mrs. Appleman concerning the date and she said, "Oh, yes, it was February." [Rep. Tr. pp. 90, 118-119.] Lamour assured the doctor that Mrs. Appleman had made an error, and after appellant had figured out that she was 51 days pregnant, asked him how much the abortion would be and the appellant stated $150.00. [Rep. Tr. p. 118.] Lamour said, "Gosh! That is a lot of money." Appellant replied, "Well, hell, you shouldn't complain about paying $150.00. I did an abortion on an ex-Earl Carroll's girl this morning for $600.00." Appellant then showed the two agents two cards bearing the name Norma Bean and the name Barker. [Rep. Tr. p. 119a.] Lamour told the appellant he would have to arrange for that amount of money, and

appellant stated he wanted to do the abortion or operation the next day. They finally agreed on April 15. Lamour asked appellant whether he would do a jelly injection or a "D & C," and appellant stated he would do one of the two. [Rep. Tr. p. 91.] But when Mrs. Appleman upon his request stated she had had no children, he stated he would do a jelly injection because her uterus was too small to do the other. [Rep. Tr. p. 92.]

They returned to the office on April 15th accompanied by three other agents of the Medical Board, who remained outside the office. [Rep. Tr. pp. 92, 120.] Appellant asked them what they wanted and they *reminded* him of their past conversation. He asked how much he stated he would charge them, and Lamour stated $150.00, whereupon appellant stated, "That is too dam cheap, but I will keep my word." He asked again who had referred them, and was told Wanda Sears, and again he indicated he did not know her. He again checked the calendar to compute the period of pregnancy and left the room. [Rep. Tr. p. 93.] Appellant returned shortly with a round blue pan containing hot water and four jars containing an amber colored substance. [Rep. Tr. p. 94.] He placed the jars in the pan. [Rep. Tr. p. 95.] Lamour asked him if this was the jelly that he was going to inject into Mrs. Appleman, and appellant stated that it was and he was putting the jars into the hot water to soften it up. Lamour asked if this would cause an abortion and appellant replied it would, "within 24 hours." Appellant stated he was not going to do a curettement. [Rep. Tr. pp. 98, 121.] Appellant asked Mrs. Appleman to empty her bladder [Rep. Tr. p. 97], and also told her to remove her panties and skirt. She looked at Lamour who shook his head, so she removed her panties but left her skirt

on. [Rep. Tr. pp. 98, 122.] Appellant again told her to take her skirt off so it would not get soiled, and she stated she did not care if it did, and got on the operating table. [Rep. Tr. pp. 98-99.] Lamour took three $50.00 bills, from which the serial numbers had been recorded, out of his pocket and said, "I suppose you want this now," and appellant replied "I don't mind at all" as he took the money and put it into his pants pocket. [Rep. Tr. pp. 99, 123.] Appellant left the room again and Lamour observed him in another room picking up a hypodermic syringe, short length of rubber tubing and a metal cannula. [Rep. Tr. p. 100.] He placed these in a sterilizer, donned his reflector, grabbed Mrs. Appleman by the thighs and pulled her toward the foot end of the treatment table. [Rep. Tr. p. 101.] He manipulated her abdomen and inquired about some scars on it, placing a sheet across it. He then placed his hands on her knees and tried pushing her legs apart, stating if he was going to do anything she would have to cooperate. [Rep. Tr. p. 103.] He tried to push her legs apart again and he was then placed under arrest. [Rep. Tr. pp. 103, 123.] The other agents entered the room and appellant stated, "You haven't anything on me, I "haven't done a pelvic." The appellant was asked for the money and removed the three $50.00 from his pocket and handed them over to the agent. The serial numbers of the bills corresponded with the bills handed to the appellant by Lamour. [Rep. Tr. p. 133.] Agent Woodruff called appellant's attention to the jars in the blue pan, the pus pan, and the amber colored substance and asked if he was preparing those for the purpose of using them upon Mrs. Appleman. He stated he was. His attention was then directed to the instruments in the sterilizer, consisting of a vaginal speculum, syringe,

rubber tubing and cannula [Rep. Tr. pp. 133-134], and he was asked if it was his intention to use those for the purpose of performing an abortion upon Mrs. Appleman, and he stated that he was preparing them for that purpose to use on her. [Rep. Tr. pp. 135-136.]

Count Two.

The testimony of Betty Fisher and George Sheehan, given at the preliminary examination of appellant, was read into the record over the objection of counsel for appellant. [Rep. Tr. p. 162.] Mrs. Louise Comers testified that in September of 1949 there were living with her at her home in Los Angeles, Betty Fisher and George Sheehan, the latter a relative. [Rep. Tr. pp. 157-158.] As far as she knew they were not in California at the time of the trial and were in the state of Minnesota. [Rep. Tr. p. 158; lines 4-9.] She stated that three weeks prior to the date of her testimony, which was October 18, 1949 [Clk. Tr. p. 13], she was back in Minnesota and talked to George Sheehan on the telephone. During the time she was in Minnesota she also saw Betty Fisher there. As far as she knew neither of them had returned to California. [Rep. Tr. pp. 158-159.] She stated she saw Betty Fisher at Mankato, Minnesota at a dance. She asked Betty Fisher if she was coming back and she said she didn't know, she might be back after Christmas, but she didn't know. [Rep. Tr. p. 160.] It was stipulated that both witnesses were present in Court on September 6, 1949, and received instructions from the court to return on October 17, the day set for trial. [Rep. Tr. p. 161.]

On November 10, 1948, Betty Fisher and George Sheehan proceeded to appellant's office in Huntington Park for an appointment. [Rep. Tr. pp. 165-166.] Appellant iden-

tified Sheehan and asked why they didn't get married. [Rep. Tr. p. 167.] Betty Fisher's last menstrual period was the latter part of September, and at appellant's request she told him this. Appellant said "Let's have a look" and took her into the examination room and at his request she got on the table there. Mr. Sheehan did not accompany her. [Rep. Tr. p. 168.] He inserted a vaginal speculum into her vagina and after a couple of minutes said O.K. and they went back into the business office. (Appellant's analysis showed she was pregnant.) [Rep. Tr. p. 210.] Appellant was asked what kind of a procedure this would be and appellant said there were two different kinds, one would be a jelly insertion, the other the scraping. When asked how long it would take, appellant stated the jelly would take over night, the scraping would take approximately 45 minutes. [Rep. Tr. p. 169.] Sheehan asked how much it would cost, and appellant said $250.00. Appellant refused to take a check [Rep. Tr. p. 170], and Sheehan left to get it cashed. Appellant took Miss Fisher back into the operating room, she got on the table at his request and she placed her feet in the stirrups at his request. [Rep. Tr. p. 171.] He inserted the vaginal speculum into her again, and also inserted an amber colored liquid through a syringe [Rep. Tr. pp. 172-173], this latter operation causing a full feeling. [Rep. Tr. p. 173.] After twenty minutes or a half hour the operations were over, appellant gave her a sanitary napkin to put on and told her to come back the next morning, and to bring anything in that she discharged. [Rep. Tr. p. 176.] She did this, bringing the matter in a jar which she gave to the appellant who examined it. [Rep. Tr. p. 176.] She got on the operating table again and he inserted an instrument in her and scraped her insides.

[Rep. Tr. p. 178.] Mr. Sheehan was with her on this occasion, but not in the room containing the operating table. [Rep. Tr. p. 178.] At the time of her visit to appellant's office Miss Fisher's health was fine, and she had not been ill or sick for several months prior to the visit other than the nausea accompanying her pregnancy. [Rep. Tr. pp. 178-179.]

George Sheehan testified that he accompanied Miss Fisher to see appellant, that he asked appellant how much it would be and appellant said, "$250.00, take it or leave it." He made out a check for this amount, got it cashed at the bank and turned the cash over to appellant who put it in his pocket. [Rep. Tr. p. 191.]

Count Three.

On July 6, 1949, the prosecuting witness Janice Werner, 18 years of age, proceeded to appellant's office in Huntington Park accompanied by Mrs. Nina Hall, the mother of her boy friend. [Rep. Tr. pp. 6-7, 50, 51.] She was pregnant at the time, having missed two periods and having had a urine pregnancy test at the Southwest Medical Center which was positive. [Rep. Tr. pp. 7-8, 342-349.] Janice was in good health at the time and had always been in good health. [Rep. Tr. pp. 9, 59, 79.] The appellant asked them which one was pregnant, and Mrs. Hall stated that it was Janice; he asked Janice when she had her last period, then checked his calendar and said she was seven or eight weeks along. Appellant asked Mrs. Hall how she had heard about him and she said that a girl she worked with had given his name to her. He asked her if she realized the responsibility she was taking and she said yes. He said, "Do you know that this is expensive?" and she replied yes. He said, "Did they tell you how much it

would be?" and she said no. He then told them it would be $250.00. [Rep. Tr. pp. 8, 52.] Janice told appellant she was pregnant and didn't want to have the child, and appellant asked both of them to come into the other office; she asked him what he was going to do and he said he was just going to examine her. They proceeded into another office which had an operating table in it with leg stirrups; to the left of the table was a smaller table and to the left of that a sterilizer. [Rep. Tr. p. 9.] Janice removed her skirt and underclothes and got on the table. [Rep. Tr. p. 10, lines 20-24.] Mrs. Hall was in the room with Janice and appellant. [Rep. Tr. p. 11, lines 1-3, p. 52.] She placed her feet in the stirrups and appellant stood between her legs after he had removed instruments from the sterilizer and placed them on the smaller table. He had a reflector on his head and spread her legs apart inserting a speculum in her vaginal tract. [Rep. Tr. pp. 11, 53.] She was on the table for forty-five minutes to an hour, the appellant using several instruments on her and packing her with cotton. She experienced a cutting and scraping sensation from the instruments he placed in her vaginal canal. [Rep. Tr. pp. 12, 13.] Appellant also took a glass syringe tube from the table and connected to it a smaller rubber tubing which he inserted into her vaginal tract. [Rep. Tr. p. 13.] There was an amber colored substance in the glass tube. [Rep. Tr. p. 14, line 22.] Appellant depressed a plunger on the glass tube and the amber substance proceeded in the glass tube through a darker substance. [Rep. Tr. pp. 15, 54.] Janice could feel a sensation of pressure being applied in her person as appellant did this; he did not say what he was doing, but when Janice asked him how long it would be, he said about fifteen minutes. [Rep. Tr.

p. 16.] The cotton with which appellant had packed her prior to the syringe operation was then removed by appellant, and placed by him on a newspaper lying on the floor; it was in a bloody condition. [Rep. Tr. p. 17.] Appellant told Janice that if she should pass anything to keep it and bring it back to him the next morning. Appellant only collected $200.00 from Mrs. Hall who told him Janice would bring the other $50.00 with her the next day. This money was in cash and no receipt was given for it. [Rep. Tr. pp. 18, 55-56.]

Janice proceeded with Mrs. Hall to the latter's home where she spent the night, suffering slight cramps that night and the next day, although nothing unusual happened. The following day she returned to appellant's office with her boy friend, the son of Mrs. Hall. [Rep. Tr. pp. 19, 56.] She went in by herself, however, and appellant asked her if she had passed anything. She told him not to her knowledge, so they again proceeded to the other room where she removed her clothes, got on the table, and the appellant went through the same procedure as he did on the 6th of July, the operations lasting a half hour to 45 minutes. [Rep. Tr. pp. 20-20a.] Appellant told her that she should have passed something, to look again and if she passed anything this time to come back the following day. There was no one else in the room during this session, and although Janice bled some, she did not hemorrhage. [Rep. Tr. p. 20a.] Janice again returned to the home of Mrs. Hall to spend the ni[illegible] again experiencing cramps, but no extreme pain. [Rep. Tr. p. 21.] On the following day she returned to appellant's office with Mrs. Hall, and he asked her again if she had passed anything. She told him she had not, and again they went through the same operations. [Rep.

Tr. p. 22.] Appellant told them this time that he was removing some blood clots from Janice, and that he was having so much trouble because Janice had such a small cervix, the size of a twelve-year-old. She was on the table this time for half an hour to forty-five minutes and suffered pain. Mrs. Hall was in the room and paid the remaining $50.00 to appellant. [Rep. Tr. pp. 23, 57.] This amount was also paid in cash and no receipt was given. [Rep. Tr. p. 24, lines 1-5, p. 58.] It was on this occasion that appellant asked two or three times if Janice was sure she had not passed anything and when she said "no" he said he couldn't understand why she didn't except that she was built very small and that might be a determining factor in why she hadn't lost it. [Rep. Tr. p. 58.] Appellant gave her pills to relieve the pain and told her to return on Monday, which was two days later. She again spent the following days at the home of her boy friend and Mrs. Hall and was ill with chills and fever. [Rep. Tr. pp. 24-25.] On Monday morning she felt better and she and Mrs. Hall again proceeded to appellant's office; he asked her again if she had passed anything, and when she said she had not, he treated her again, but for a shorter period. [Rep. Tr. p. 25.] While he was working on her on this occasion, she got severe pains under her ribs and could barely get off the table. He again gave her pills and gave Mrs. Hall his home phone in the event Janice became ill. [Rep. Tr. p. 26.] The following day she was ill and Mrs. Hall called appellant to the house. [Rep. Tr. pp. 27, 60.] Appellant sterilized his instruments and while Mrs Hall held a flashlight for him, he inserted the instruments in Janice, this time not only with the scraping pain but also the other severe pains she was suffering. He removed a blood clot from her 1½

inches to 2 inches in diameter. [Rep. Tr. pp. 28, 61.] On the following day, July 13, appellant again returned to the house [Rep. Tr. p. 29], and told Janice he didn't know what her severe pains were from, saying to Mrs. Hall, "I don't know what is the matter with the girl. Here is your $250.00 back." He also said they hadn't accomplished what they set out to do. [Rep. Tr. p. 63.] Appellant then stated they would have to tell Janice's mother, and he and Mrs. Hall departed to get her. [Rep. Tr. pp. 31, 63.]

Appellant and Mrs. Hall did pick up Janice's mother [Rep. Tr. p. 80], and appellant told her Janice was very sick and he thought she had a ruptured appendix and would have to go to the hospital. He also said, "Your daughter went to the beach this morning and I think it was her period and she has got a tumor or something" or "she has tried to abort herself with a knitting needle . . . I don't know, you can never tell about these kids." [Rep. Tr. pp. 80-81.] They returned to Mrs. Hall's home, and then made arrangements to take Janice to the Southwest Hospital. Janice's eyes were abnormally large and she appeared to be very dry and ill. [Rep. Tr. p. 81.] Appellant was discharged by Mrs. Werner and Dr. Wunderlich was hired to take care of Janice. [Rep. Tr. p. 83.] It required eight weeks of hospitalization and three operations to effect her recovery. [Rep. Tr. pp. 32, 84.]

Dr. Wunderlich found that Janice was acutely ill, was bleeding from the vagina and appeared to be very toxic. The blood was coming from the mouth of the womb in a slow constant trickle, which was enlarged and boggy. His diagnosis showed she was suffering from an advanced generalized peritonitis. [Rep. Tr. p. 143.] Janice told him she had had an abortion several days previously,

and had developed severe abdominal pains, and from this and her condition he concluded the peritonitis was caused by a perforation of the womb. [Rep. Tr. p. 145.] He testified that the soft boggy cervix was suggestive of pregnancy. [Rep. Tr. p. 56, lines 16-19.]

Appellant's Story and Rebuttal.

Appellant took the stand in his own defense. In regard to the offense of attempted abortion, his testimony substantially corroborated the testimony of Lamour and Beverly Appleman as to her two visits. [Rep. Tr. pp. 196-206.] He admitted receiving the $150.00 from Lamour. [Rep. Tr. p. 199.] He admitted that he told Lamour that the amber colored substance, which he called Leunbach's paste and which was in the jars which he placed in the pan containing the hot water, would produce an abortion. [Rep. Tr. p. 205.]

In regard to the alleged abortion committed on Betty Fisher, he admitted her visit to him on November 10th, and that she was accompanied by Sheehan. [Rep. Tr. p. 209.] He admitted that his diagnosis of her condition was that she was six to eight weeks pregnant and her uterus was enlarged. [Rep. Tr. p. 210.] He admitted treating her vaginal tract and measuring her uterus with a uterine sound. [Rep. Tr. p. 210.] He stated that he told them that the enlarged uterus indicated to him that her pregnancy was not normal and that she might have a hydatiform mole or cystis degeneration of pregnancy. [Rep. Tr. p. 213.] He admitted that he injected 22 ccs. of Leunbach's paste to have her expel whatever there was in her uterus if it was abnormal. [Rep. Tr. p. 214.] He admitted receiving the money from Sheehan. He asserted that what she brought in to him confirmed his

analysis that she had a hydatiform mole and that he told her this. [Rep. Tr. p. 215.] He also admitted the second treatment of Miss Fisher in his office. [Rep. Tr. p. 216.]

In regard to the alleged abortion committed on Janice Werner, he admitted the visit to his office of Janice and Mrs. Hall. [Rep. Tr. p. 219.] He admitted inserting a uterine sound and injecting Leunbach's paste. [Rep. Tr. p. 221.] He admitted the subsequent visits by Janice, and inquiring if she had passed anything. [Rep. Tr. pp. 223, 224.] He admitted subsequent injections of Leunbach's paste. [Rep. Tr. p. 225.] He admitted receiving the call from Mrs. Hall to attend Janice at home, but stated he volunteered to go. [Rep. Tr. p. 229.] He stated that Mrs. Hall showed him the blood clot which Janice had expelled when he arrived. [Rep. Tr. p. 230.] He admitted using a sound again. [Rep. Tr. p. 230.] He admitted giving Mrs. Hall her money back and contended that he did this because he felt Mrs. Hall should have no responsibility in the matter. [Rep. Tr. pp. 228, 231.]

He admitted telling the superintendent of the Southwest Hospital at the time of the admission of Janice Werner that there might have been a possibility of attempted abortion. [Rep. Tr. p. 245.] He denied that a uterine sound according to established practice in Los Angeles County was used to measure the depth of the uterus prior to a curettement. [Rep. Tr. pp. 256-257.] He admitted that in the case of Betty Fisher, if his alleged diagnosis were wrong, he would be committing an abortion. [Rep. Tr. p. 264.] In the case of Janice Werner, he stated that his conclusion was that she was not pregnant, but he still admitted injecting the paste, stating that if she had anything in her uterus, this would cause it

to be expelled and they could see what it was. [Rep. Tr. p. 277.] He admitted making an entry for the hospital record at the time Janice was admitted, stating he first saw her on June 13, and stated that this was error, that he first saw her on July 6; the entry also stated that she was in a semi-coma on the occasion of date set forth as the first visit. [Rep. Tr. p. 291.] He subsequently stated he was not sure he wrote this. [Rep. Tr. p. 291.] This report also indicated that Janice had seen a chiropractor who had examined her from below with a rubber glove and an instrument resembling a vaginal speculum. [Rep. Tr. p. 292.] Although he failed to make any reference to this in his direct examination. [Rep. Tr. p. 293.]

Dr. Edward Jones was called as an expert by the prosecution on rebuttal and testified that it was not the established practice in Los Angeles County among medical men to use a uterine sound to determine pregnancy, and that it was used whenever a curettement was planned to determine length and direction of the uterus, to avoid perforation of the uterus. [Rep. Tr. p. 351.] He also testified that it was not customary in treating a hydatiform mole to inject a substance like Leunbach's paste to cause a contraction of the uterine muscles to expel whatever was there. [Rep. Tr. p. 356.] He also testified that if there were any question of pregnancy under the usual practice other doctors would be called in for consultation, and that an operation to remove the mole would be performed in a hospital. [Rep. Tr. p. 358.] He also testified that it was not good practice to inject an irritant substance in the uterus to facilitate the menstrual flow. [Rep. Tr. p. 359.] For further facts see opinion of District Court of Appeal, 98 A. C. A. 657.

Argument.

In his petition for certiorari the petitioner seeks to have this Honorable Court take jurisdiction of this cause on three grounds:

(1) That his rights under the federal constitution were violated because he was charged by information rather than indicted; (2) That Section 686 of the California Penal Code is unconstitutional in that it permits the prior testimony of a witness given at a preliminary hearing to be introduced into evidence where the witness is shown to be unavailable at the time of trial; (3) That he was entrapped by law enforcement officers and that the use of their testimony violated his constitutional rights. It is respectfully submitted that in the light of past decisions of this Honorable Court, and in the light of the record in the instant case, there is no substance to these contentions.

I.

No Rights of Appellant Under the Federal Constitution Were Violated Because He Was Charged by Information Rather Than Indicted.

As pointed out in the decision of the District Court of Appeal of the State of California, a long line of decisions from this Honorable Court have repeatedly reiterated the proposition that neither the Fifth Amendment to the Federal Constitution, nor the Sixth Amendment, nor any other part of the Bill of Rights places restrictions upon the states in the prosecution of criminal cases.

Wolf v. Colorado (1949), 338 U. S. 25, 69 S. Ct. 1359;

People v. Adamson (1947), 332 U. S. 46, 67 S. Ct. 1672;

Twining v. New Jersey (1908), 221 U. S. 78, 93, 98, 29 S. Ct. 14;

West v. Louisiana (1903), 194 U. S. 258, 262, 24 S. Ct. 650;

Brown v. New Jersey (1899), 175 U. S. 172, 175, 20 S. Ct. 77.

Likewise, this Honorable Court has already decided that the Fourteenth Amendment of the Federal Constitution is not violated because a state chooses to proceed in a criminal cause by information rather than by indictment. In the case of *Hurtado v. California* (1883), 110 U. S. 516, 4 S. Ct. 111, the charge was raised that Article I, Section 8 of the California Constitution permitting the filing of an information in lieu of indictment by grand jury violated the due process clause of the Fourteenth Amendment, and this Honorable Court held that it did not. In the case of *Maxwell v. Dow* (1900), 176 U. S. 581, at pages 584-585, 20 S. Ct. 448, the contention was made that the privileges and immunities clause of the Fourteenth Amendment was violated by this provision in the California Constitution, and this Honorable Court rejected this contention also.

II.

Section 686 of the California Penal Code Is Not Unconstitutional and No Constitutional Rights of the Petitioner Were Violated by Permitting the Testimony of Absent Witnesses Given at His Preliminary Hearing to Be Read Into Evidence, Where the Proper Foundation Was Laid and Where Petitioner Was Confronted by Them at the Preliminary Hearing and Had Opportunity to Cross-examine Them.

Subdivision Three of Section 686 of the California Penal Code permits the testimony of a witness given at a preliminary hearing to be read into evidence where the foundation is laid to show that such witness is either dead or insane or cannot with due diligence be found within the state. After holding that the proper foundation had been laid, the District Court in its opinion properly sustained the constitutionality of Section 686, pointing out that there was no claim by the petitioner that he was not confronted by the witnesses at his preliminary hearing and had no opportunity to cross-examine them. In the case of *West v. Louisiana*, 194 U. S. 258, a similar contention was made on the ground that the Supreme Court of Louisiana violated the due process clause of the Fourteenth Amendment to the Federal Constitution when it permitted the admission into evidence in a criminal case of a deposition of a witness who was not available at the time of trial, and this Honorable Court rejected this contention and held that the due process clause was not violated so long as the defendant, as is the situation in the instant case, was confronted by the witnesses against him at the time of the taking of the deposition and had the right to cross-examine them if he so desired. The case of *People*

v. Wallin (1950), 34 Cal. 2d 777, 215 P. 2d 1, cited by petitioner, is not contrary to these holdings, but likewise holds that a defendant is deprived of no constitutional rights where he was confronted by the witnesses against him at the preliminary hearing and had opportunity for cross-examination. (34 Cal. 2d at page 781.)

III.

The Petitioner Was Not Convicted Upon Any Illegal Testimony; the Jury Was Properly Instructed on the Law Pertaining to Entrapment and Its Implied Finding That There Was No Entrapment Is Amply Supported by the Record.

Petitioner's contention that he was entrapped stems from the fact that agents of the State Medical Board, action under cover, went to his office to present the opportunity to him of committing an abortion in violation of the law. There is no question but that these persons were special agents of the Board and that they were acting in their official capacity in seeking to ferret out a doctor who was illegally performing abortions. The line between the performance of official duty in ferreting out persons who are violating the law and the entrapment of persons innocent of criminal intent and induced to commit a crime by virtue of entrapment has clearly been established by the decisions of the appellate courts of the State of California. In the case of *People v. Makovsky* (1935), 3 Cal. 2d 366, 369, 44 P. 2d 536, the Supreme Court of this State stated:

> " 'It is unquestionably true that decoys may not be used to ensnare the innocent and lawabiding into

the commission of crime when the criminal design originates not with the accused but is conceived in the minds of officers, and the accused is by persuasion, deceitful representation or inducement lured into the commission of a criminal act. When an officer induces a person to commit a crime, which he would not have committed without such inducement, the law will not punish the person so lured into the crime. (People v. Malone, 117 Cal. App. 629 (4 Pac. (2d) 287).) Under such circumstances the government is estopped by sound public policy from prosecuting therefor. The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite and create crime for the sole purpose of prosecuting and punishing it. While decoys may be used to entrap criminals and to present opportunity to one intending to commit a crime, they are not permitted to ensnare the innocent into the commission of a crime when the criminal design originates not with the accused but is conceived in the minds of the officers, and the accused is by persuasion or inducement lured into a criminal act. (Newman v. United States, 299 Fed. 128; People v. Malone, *supra.*)'"

This principle has been restated and summarized by saying that there is no entrapment where the defendant was in his own mind ready to commit the crime, and it was only the opportunity to commit it that was suggested by law enforcement officers, even though such opportunity consists of placing of facilities for the commission of the crime purposely in the way of the defendant or using

"decoy solicitation" of persons seeking to expose the criminal or feigning complicity in the act and apparently assisting in its commission.

People v. Cherry (1940), 39 Cal. App. 2d 149, 153, 154, 102 P. 2d 546;

People v. Kennedy (1944), 66 Cal. App. 2d 522, 523, 152 P. 2d 513;

People v. Caiazza (1923), 61 Cal. App. 505, 509, 215 Pac. 80.

But the mere fact that law enforcement officers requested the petitioner to perform an abortion and indicated to him that they were willing to pay for it, did not constitute entrapment.

Since entrapment was a theory of the defense, the trial judge, in accordance with the law expressed above, instructed the jury on entrapment as follows:

> "The law does not tolerate a person, particularly a law enforcement officer, generating in the mind of a person who is innocent of any criminal purpose, the original intent to commit a crime thus entrapping such person into the commission of the crime which he would not have committed or even contemplated but for such inducement; and where a crime is committed as a consequence of such entrapment, no conviction may be had of a person so entrapped as his acts do not constitute a crime.
>
> "If the intent to commit the crime did not originate with the defendant and he was not carrying out his own criminal purpose but the crime was suggested by

another person acting with the purpose of entrapping and causing the arrest of the defendant, then the defendant is not criminally liable for the act so committed." [Clk. Tr. pp. 29, 30.]

The trial judge also instructed the jury:

"It is important in considering the defense of entrapment to ascertain whether the acts charged as constituting the offense were the result of the intent of some other person to place the accused in a position where he might be charged with the offense, in which event the defendant may not be convicted or whether the defendant, acting in pursuance of his own intent, committed the acts, such other person merely affording him the opportunity of doing so, in which latter event the defense of entrapment would not relieve the defendant from responsibility." [Clk. Tr. p. 30.]

The evidence on which the implied finding of the jury that there was no entrapment was based and upon which the appellate court reached the same conclusion reveals that the agents of the Medical Board went to the petitioner's office for the purpose of presenting to him the opportunity of committing an abortion. The first visit resulted in no overt act upon the part of the appellant because the "decoy" misstated "the date of her last menstrual period," and after a discussion over the price, the petitioner told them to come back. On the second occasion, two days later, nothing was said to induce or persuade him to commit any criminal act. He prepared his

instruments, he in effect told one of the agents he intended to commit the abortion, and he commenced action to accomplish the abortion on the female agent when the other agents revealed their official capacity. Furthermore, the evidence shows that by his own statements he was habitually engaged in this unlawful enterprise, for he described another abortion he had performed on the same day and stated the amount paid to him for the operation.

If the petitioner's contention is sound, one of the largest fields of police work, viz., the detection of criminals through traps laid by undercover operators, would have to be abandoned. It is respectfully submitted that such a conclusion is unsound and unsupported by any authority, and that where the law, as it does in California, protects the individual by preventing his conviction where the police officer generates the intent to violate the law in the mind of a person who otherwise would have no such intent, due process is satisfied. In the instant case, the petitioner was not denied due process because the jury, upon proper charge by the court, found against his defense of entrapment, nor was he denied due process because the appellate court reviewed the evidence and concluded that the jury's verdict against entrapment was supported by the record.

Conclusion.

It is respectfully submitted that the petitioner has not shown that the decision of the District Court of Appeal is contrary to any previous decision of this Honorable Court, but on the contrary it is clear from the authorities cited herein, that the decision is supported by prior holdings of this Honorable Court. It is also respectfully submitted that as to Count One of the information, petitioner has failed to show that he was convicted due to the use of evidence obtained by illegal entrapment, but that on the contrary the decision of the jury and the District Court of Appeal that there was no evidence of illegal entrapment, is supported by the record.

Wherefore, it is respectfully requested that the petition for writ of certiorari be denied and that this Honorable Court refuse to take jurisdiction of this cause.

Respectfully submitted,

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